Attachment 7

Indiana Water Quality Coalition Issue Paper – Antidegradation Rulemaking

Exemption for Discharges that have been Granted Variances

Discharges that have been granted variances should not also be required to submit an antidegradation demonstration because the application and review process for obtaining a variance is substantially the same as the antidegradation demonstration and review process.

The antidegradation rule should include provisions specifying that antidegradation review is not required for agency-approved variances, including variances from water quality standards, 316(a) thermal variances, and other variances authorized by the Clean Water Act.

Water quality standard variances: The Indiana water quality rules authorize dischargers to apply for a variance from a water quality standard used to derive a water quality-based effluent limitation contained in a NPDES permit for a specific substance. *See* 327 IAC 2-1-8.8 (non-Great Lakes basin) and 327 IAC 2-1.5-17 (Great Lakes basin). Indiana has also adopted a rule authorizing a streamlined mercury variance. *See* 327 IAC 5-3.5. All water quality standards variance applications must review the types of technology capable of treating the pollutant of concern, as well as the social and economic costs of installing and operating each type of technology. This review is very similar to the technology review and demonstration of social or economic importance that is required for antidegradation review. In fact, U.S. EPA recommends that states use the same process for reviewing social and economic impacts for variances and antidegradation review. *See* Interim Economic Guidance for Water Quality Standards Workbook, EPA 823/B-95-002 (March 1, 1995). Thus, if IDEM has granted a variance to a discharger, the discharger should not also need to complete an antidegradation demonstration. The antidegradation rule should contain an exemption for discharges that have been granted water quality standards variances.

316(a) thermal variances: Section 316(a) of the Clean Water Act authorizes variances from a state's temperature criteria in cases where a discharger demonstrates that the thermal discharge "will assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water." Such demonstrations are significant undertakings involving detailed biological studies; additional information about the 316(a) thermal variance demonstration process is attached to this issue paper. The draft antidegradation rule contains the following provision concerning such thermal variances:

> Except for ONRWs, any determination made by the commissioner in accordance with Section 316 of the Clean Water Act concerning alternative thermal effluent limitations shall be considered to be consistent with the antidegradation standards contained in this section.

Draft 327 IAC 2-1.3-3(e). The Coalition supports this provision, but recommends that the introductory clause excepting Outstanding National Resource Waters be deleted. 316(a) variances should apply to all tiers of waters, consistent with U.S. EPA's long-standing position that Section 316 takes precedence over other requirements of the CWA. *See* Questions & Answers on Antiegradation #29, p. 15 (available at http://www.epa.gov/waterscience/standards/library/antidegqa.pdf).

Other CWA variances/modifications: Section 301 of the Clean Water Act authorizes several other types of variances and modifications that are similar in nature and effect to the water quality standards variances or 316(a) variances discussed above. For example, CWA 301(g) allows for modifications to certain nonconventional pollutants. *See* 33 U.S.C. § 1311(g). This provision specifies several requirements for demonstrating the necessity of the modification, including the following:

> [S]uch modification will not interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

33 U.S.C. § 1311(g)(2)(C). For the same reasons provided above on other types of variances, these CWA Section 301 variances should also be exempt from antidegradation review, because the process used to evaluate and grant these variances is substantially similar to the antidegradation review process.